
SECTION 1983 — QUALIFIED IMMUNITY — NINTH CIRCUIT
HOLDS THAT SCHOOL’S STRIP SEARCH OF A STUDENT VIOLATED
THE FOURTH AMENDMENT UNDER CLEARLY ESTABLISHED LAW. — *Redding v. Safford Unified School District No. 1*,
531 F.3d 1071 (9th Cir. 2008) (en banc).

Qualified immunity allows public officials to carry on their duties without the fear of liability or the burdens of litigation.¹ The Supreme Court’s modern qualified immunity test asks whether a constitutional right was “clearly established” at the time of its violation by a public official such that no reasonable official could have believed his actions were lawful.² The Court has described this standard as giving “ample room for mistaken judgments”³ by protecting “all but the plainly incompetent or those who knowingly violate the law.”⁴ Recently, in *Redding v. Safford Unified School District No. 1*,⁵ the Ninth Circuit, sitting en banc, denied qualified immunity to a middle school assistant principal after finding that the assistant principal violated the Fourth Amendment by mandating an unreasonable strip search of a student.⁶ A bare majority concluded the law was clearly established without weighing the fact that the district court, two judges on the Ninth Circuit panel, and three dissenting judges en banc thought the search was constitutional.⁷ Ignoring judicial disagreement about constitutionality in the “clearly established” analysis effectively holds laypeople to a higher standard of predicting reasonableness than judges. This refusal to acknowledge dissent is thus inimical to the purposes of the doctrine, particularly in the school setting, where flexibility is highly valued. In *Redding*, appropriate consideration of disagreement would have led to a grant of qualified immunity — a grant in line with both the purposes of qualified immunity and other cases addressing disagreement about clearly established law.

The morning of October 8, 2003, Jordan, a student, approached Assistant Principal Wilson and alerted him that a group of students were planning to take pills during lunch.⁸ Jordan produced a white pill, identified as a 400-milligram tablet of ibuprofen that is available only

¹ See *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982); Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope’s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 566 (2006).

² *Harlow*, 457 U.S. at 818.

³ *Malley v. Briggs*, 475 U.S. 335, 343 (1986).

⁴ *Id.* at 341.

⁵ 531 F.3d 1071 (9th Cir. 2008) (en banc).

⁶ *Id.* at 1074.

⁷ *Id.* at 1089; *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 829 (9th Cir. 2007); *Redding v. Safford Unified Sch. Dist. No. 1*, No. 04-0265, slip op. at 19 (D. Ariz. Mar. 15, 2005).

⁸ *Redding*, 531 F.3d at 1076.

by prescription.⁹ He stated that he had received the pill from Marissa, a fellow student.¹⁰ Wilson brought Marissa into his office and searched her belongings.¹¹ The search revealed additional pills and a planner, borrowed from a student named Savana Redding, and containing knives, a cigarette, and a lighter.¹² Upon questioning, Marissa stated she had received the pills from Savana.¹³ Savana was called to the principal's office, and when she arrived she saw her planner, the other items, and the pills on the principal's desk.¹⁴ Savana explained that the items were not hers and she had never brought pills to school.¹⁵ After futilely searching Savana's belongings for prescription drugs, Wilson instructed his secretary and the school nurse, both females, to conduct a more thorough search.¹⁶ In the nurse's office, Savana was asked to remove her shirt and pants.¹⁷ She was then asked to pull her bra out to the side and shake it, and to do the same with her underwear.¹⁸ After the search failed to reveal pills, Savana dressed and returned to the office.¹⁹

Savana's mother filed a § 1983²⁰ claim in the District of Arizona against the school, Wilson, his secretary, and the nurse.²¹ Under *Saucier v. Katz*,²² holding a state officer civilly responsible for constitutional violations requires a two-step inquiry.²³ First, the court must decide if there was a violation of a right on the facts alleged.²⁴ Second, the court must determine if the right was clearly established.²⁵ The Reddings argued that the strip search violated Savana's Fourth Amendment privacy rights against unreasonable searches and that such a right was clearly established.²⁶ The defendants moved for summary judgment, arguing the search was reasonable, particularly in light of the school's history of drug-related problems.²⁷ The district

⁹ *Id.* Possession of prescription drugs without permission violated a school rule. *Id.* at 1075.

¹⁰ *Id.* at 1076.

¹¹ *Id.*

¹² *Id.* at 1074-76.

¹³ *Id.* at 1076-77.

¹⁴ *Id.* at 1074.

¹⁵ *Id.* at 1075.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* In following these instructions, Savana exposed her breasts and pelvic area. *Id.*

¹⁹ *Id.*

²⁰ Section 1983 allows civil actions for deprivation of constitutional rights by state officials. 42 U.S.C. § 1983 (2000).

²¹ *Redding*, 531 F.3d at 1077.

²² 533 U.S. 194 (2001).

²³ *Id.* at 200.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Redding*, 531 F.3d at 1077.

²⁷ *Id.*

court applied the two-prong constitutionality test required by *New Jersey v. T.L.O.*,²⁸ finding the search both justified at its inception and reasonable in scope.²⁹ The court held that the search was justified because the borrowed planner created a sufficient nexus between the girls to corroborate Marissa's tip.³⁰ Furthermore, the court believed the search was reasonable in scope because it was related to the objective of locating the pills and was not "excessively intrusive."³¹ Because the court found the search constitutional, it was unnecessary to proceed to *Saucier's* second-step "clearly established" analysis.

Reviewing the grant of summary judgment de novo, a panel of the Ninth Circuit affirmed.³² The majority found that "[a]mple facts supported Marissa's veracity as an informant," including allegations that Savana had previously served alcohol to students.³³ The court noted the school's "strong interest both in safeguarding students . . . from the harm posed by the misuse of prescription drugs and in enforcing [its] official policy."³⁴ The court further found that the size of the contraband, a small pill, meant the scope of the search was reasonably related to the objective of discovering it.³⁵ Moreover, the court believed the search was conducted in a reasonable manner because only females were present, no student witnessed it, and Savana was not touched.³⁶ Because the court concluded the search did not violate Savana's rights,³⁷ the panel, like the court below, did not reach the qualified immunity issue.³⁸

The Ninth Circuit reheard the case en banc and reversed in a 6–5 decision.³⁹ Writing for the majority, Judge Wardlaw found the search unconstitutional because neither prong of the *T.L.O.* test was satisfied.⁴⁰ The majority determined the strip search was not justified at its inception because the search of Savana's belongings had not turned up any evidence of pills.⁴¹ Commenting that the pills were the equivalent of two Advil,⁴² the court thought "school authorities adopted a

²⁸ 469 U.S. 325 (1985).

²⁹ *Redding*, 531 F.3d at 1078.

³⁰ *Id.* at 1077–78.

³¹ *Id.* at 1078 (quoting *Redding v. Safford Unified Sch. Dist. No. 1*, No. 04-0265, slip op. at 18 (D. Ariz. Mar. 15, 2005)) (internal quotation marks omitted).

³² *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 836 (9th Cir. 2007).

³³ *Id.* at 834.

³⁴ *Id.* at 835.

³⁵ *Id.*

³⁶ *Id.* at 835–36.

³⁷ *Id.* at 836.

³⁸ See *Redding*, 531 F.3d at 1078.

³⁹ *Id.* at 1074, 1089, 1091.

⁴⁰ *Id.* at 1074.

⁴¹ *Id.* at 1085.

⁴² *Id.* at 1074.

disproportionately extreme measure.”⁴³ Turning to qualified immunity, the court concluded that the right of a student to be free from strip searches under these circumstances was clearly established based on case law and “[c]ommon sense and reason.”⁴⁴ Because the court found that both steps of *Saucier* were met, it reversed the panel decision.⁴⁵

Judge Gould dissented, finding that although the search violated Savana’s privacy right,⁴⁶ this right was not clearly established because “the law heretofore did not give adequate guidance to the school officials.”⁴⁷ Judge Gould also noted that “[t]he fact that the district court and a majority of a prior panel of our court thought, and some dissenting judges on this panel continue to think, the scope of the search reasonable to me says something about a lack of clarity in our law.”⁴⁸

In an opinion longer than that of the majority, Judge Hawkins, joined by two judges, also dissented.⁴⁹ Going a step further than Judge Gould, Judge Hawkins would have found that the search did not violate the Constitution.⁵⁰ First, the Hawkins dissent emphasized the need for flexibility in schools as enunciated in *T.L.O.*⁵¹ Judge Hawkins then opined that there was reasonable suspicion that Savana was involved in distributing prescription drugs⁵² and that the threat was not defused simply because Savana was in the principal’s temporary custody.⁵³ Discussing qualified immunity, the dissent criticized the court for “failing to cite a single *T.L.O.* search case aside from *T.L.O.* itself.”⁵⁴ The dissent then examined a series of cases demonstrating “the legal ambiguity” that existed.⁵⁵

It is disconcerting that the majority found clearly established law where two earlier courts and a three-judge dissent found no violation of rights at all, much less clearly established ones, particularly given the purposes of qualified immunity. The Supreme Court has described qualified immunity as necessary to avoid “the injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion.”⁵⁶ The concern is that “the threat of such liability would deter [an officer’s] willingness to execute his office

⁴³ *Id.* at 1085.

⁴⁴ *Id.* at 1088.

⁴⁵ *See id.* at 1089.

⁴⁶ *Id.* at 1090 (Gould, J., dissenting).

⁴⁷ *Id.* at 1091.

⁴⁸ *Id.* at 1090–91.

⁴⁹ *Id.* at 1091 (Hawkins, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.* at 1091–95.

⁵² *Id.* at 1098–1100.

⁵³ *Id.* at 1108.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1108–11.

⁵⁶ *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

with . . . the judgment required by the public good.”⁵⁷ To avoid “unduly inhibit[ing] officials in the discharge of their duties,”⁵⁸ courts must grant immunity “if a reasonable officer could have believed . . . his conduct was lawful.”⁵⁹ In *Redding*, that five of the fourteen judges to pass on the case believed the search was constitutional strongly suggests that a principal of reasonable competence also could have believed the search was lawful.

Discretion to fulfill job responsibilities is especially important in the school setting.⁶⁰ The recognized need for latitude in schools should extend beyond the constitutionality analysis to inform qualified immunity. This need for flexibility has led the Court to limit students’ Fourth Amendment rights.⁶¹ Indeed, the very justification for lowering the “probable cause” standard to “reasonable suspicion” for student searches is the Court’s recognition that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures,” and respect for “the value of preserving the informality of the student-teacher relationship.”⁶² This flexibility is necessary to ensure that “[a] teacher’s focus is . . . on teaching and helping students, rather than on developing evidence against a particular troublemaker.”⁶³ Courts have noted the benefits of increased flexibility for

⁵⁷ *Id.*; see also Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 81 (1999) (“[The] justification . . . is that [qualified immunity] gives public employees the protection they need to do their jobs with confidence.”).

⁵⁸ *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); see also Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1032–33 (2005) (“Predictable liability is [important] . . . because society and the law alike favor action . . . in the face of ambiguity.”); Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1502 (1996) (“[C]ourts focus on . . . whether liability was predictable If not, the official should not have to choose between liability for failing to act and liability for acting.”).

⁵⁹ *Saucier v. Katz*, 533 U.S. 194, 199 (2001).

⁶⁰ See *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) (discussing the “flexible standard [that] allows a school administrator or court to weigh the interest of a school in maintaining order against the substantial privacy interests of students”).

⁶¹ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (“Fourth Amendment rights . . . are different in public schools than elsewhere . . .”).

⁶² *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985) (“[T]he accommodation of the privacy interests of schoolchildren with the substantial need . . . for freedom to maintain order in the schools does not require . . . searches [to] be based on probable cause [T]he legality of a search of a student should depend simply on [its] reasonableness”); see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 828–29 (2002) (discussing need for flexibility to ensure law does not “unduly interfere with the maintenance of the swift and informal disciplinary procedures” needed in school setting (quoting *Vernonia*, 515 U.S. at 653) (internal quotation marks omitted)); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1073 (2003) (discussing how “the unique public school setting call[s] for relaxation of the search standards”).

⁶³ *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in the judgment); see also J. Chad Mitchell, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students’ Rights with School Safety*, 1998 BYU L. REV. 1207, 1224 (discussing need for relaxed

school officials because, unlike the adversarial police-criminal relationship, the relationship between an educator and student is one of guidance.⁶⁴ The additional flexibility afforded school officials means not only that the typical principal will be more reasonable in believing his actions are constitutional, but also that qualified immunity should be granted liberally to maintain the ability and willingness of principals to use their discretion for the good of their students.

In addition to the intuitive logic suggesting courts should consider substantive dissents in the clearly established analysis, courts have recognized the significance of judicial disagreement in other qualified immunity contexts. First, one circuit has refused to find the law clearly established where the precedential case establishing the right was not itself unanimous.⁶⁵ The court found that “[i]t would not be fair to hold a state official liable for not fulfilling ‘clearly established’ obligations when a federal Circuit Court of Appeals was unable to unanimously decide the same issue.”⁶⁶ If dissent in the precedent case creates law that is not clearly established, dissent in the same case indicates the law is even less established.⁶⁷ Second, courts hearing § 1983 claims have suggested that a circuit split “indicates that the [plaintiff’s] rights in this regard are currently unsettled.”⁶⁸ Further, courts have based denial of qualified immunity on “unanimity of the case law in other circuits.”⁶⁹ Although a court could interpret a circuit split to mean that a state actor would have practical difficulty choosing between rules,⁷⁰ a court may also recognize that if reasonable circuits disagree about a constitutional right, the right may not be all that clear. Third, at least one dissenting Supreme Court Justice has argued that the majority was wrong to deny qualified immunity as a matter of law, and his position was “strongly reinforced by the differing opinions expressed by the Circuit Judges who have reviewed the record.”⁷¹ Fourth, the difficulty of finding clearly established law where legal

search rules to avoid “divert[ing] valuable educational and administrative resources from the educational process”).

⁶⁴ *T.L.O.*, 469 U.S. at 349–50 (Powell, J., concurring); see also *Vernonia*, 515 U.S. at 655 (describing school administrator’s role as “custodial and tutelary”).

⁶⁵ See *Harris v. Young*, 718 F.2d 620, 623–24 (4th Cir. 1983).

⁶⁶ *Id.* at 624.

⁶⁷ *But see Merritt v. Mackey*, 932 F.2d 1317, 1321 n.3 (9th Cir. 1991) (distinguishing *Harris* and rejecting this argument).

⁶⁸ *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992); see also *McCabe v. Macaulay*, 545 F. Supp. 2d 857, 862 (N.D. Iowa 2008) (“Defendants were entitled to qualified immunity, because the law on the issue of such animus was subject to a circuit-split and thus not clearly established.”).

⁶⁹ *Greenwood v. N.Y. Office of Mental Health*, 163 F.3d 119, 123 (2d Cir. 1998); cf. *Ohio Civil Serv. Employees Ass’n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

⁷⁰ See *Marsh v. Butler County*, 268 F.3d 1014, 1032–33 n.10 (11th Cir. 2001) (en banc) (“We do not expect public officials to sort out the law of every jurisdiction in the country.”).

⁷¹ *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting).

professionals disagree animates the “reliance on the advice of counsel” exception, which can shield officials from liability where they have acted in accordance with erroneous legal advice, regardless of the clarity of the law.⁷² One court has explicitly said that even if it was not an automatic grant, the fact that “such an array of competent lawyers” believed the acts were constitutional suggests the law was not clearly established and would have granted qualified immunity anyway.⁷³ These four situations — disagreement within a precedent-setting case, disagreement among circuits, disagreement among judges, and disagreement between advising counsel and the judiciary — all suggest that courts already consider disagreement in determining a right’s clarity. Thus, the *Redding* court should have appreciated that judicial disagreement informs the clearly established analysis not just because of the purposes of the doctrine, but because courts routinely do so in other § 1983 cases.

In light of the purposes of qualified immunity, the extra latitude afforded school officials, and the treatment of disagreement in similar contexts, the court erred in holding that Principal Wilson’s actions were clearly unconstitutional where five federal judges did not find a violation at all. The appellees briefed this issue, writing: “But if a federal judge — with the benefit of legal training, briefing and argument from the parties, law clerks, time to reflect, etc. — concludes that there was no violation, then it hardly seems possible that a reasonable official . . . could understand that he was violating someone’s rights.”⁷⁴

Yet the *Redding* majority did not give this issue any weight in evaluating the “reasonable official” standard. Instead, the court dismissed concerns raised by the dissents in a footnote, stating: “There need not be judicial unanimity for us to conclude that a right was clearly established to a reasonable officer. Indeed, majorities on the Supreme Court and the various circuits have declared a right clearly established over the dissents of their colleagues.”⁷⁵ The three cases cited, however, do not directly apply to the issue in *Redding*. First, none of the cases involved the rights of students, a situation which, as described above, warrants special protection of public officials.⁷⁶ Sec-

⁷² See *Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir. 1998); *V-1 Oil Co. v. Wyo. Dep’t of Env’tl. Quality*, 902 F.2d 1482, 1489 (10th Cir. 1990).

⁷³ *Alexander v. Alexander*, 573 F. Supp. 373, 375 n.4 (M.D. Tenn. 1983) (“The advice of the State Attorney General, two assistants, Special Counsel Fred Thompson, and counsel to the Governor, Tom Hull, all was that the Governor was on firm legal grounds . . .”).

⁷⁴ Brief of Respondent-Appellee at 18, *Redding*, 531 F.3d 1071 (No. 05-15759).

⁷⁵ *Redding*, 531 F.3d at 1088 n.13 (citing *Groh v. Ramirez*, 540 U.S. 551 (2004); *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223 (6th Cir. 2005); *Johnson v. Hawe*, 388 F.3d 676 (9th Cir. 2004)).

⁷⁶ See *Groh*, 540 U.S. at 551 (discussing constitutionality of police search of private residence with invalid warrant); *Evans-Marshall*, 428 F.3d at 223 (discussing constitutionality of school

ond, none of the cases involved a court overturning two previous decisions holding the official's actions constitutional.⁷⁷ In fact, in one case, the only dissent was on the issue of clarity itself.⁷⁸ Cherry-picking three cases to show that dissent does not *require* a finding of ambiguity does nothing to advance the discussion of why it does not *support* such a finding.

Multiple disagreements regarding the constitutionality of a school official's actions should warrant special discussion during qualified immunity review, even if the creation of a unanimity requirement is not viable because it poses a danger of creating a judicial veto power.⁷⁹ The "common sense" approach the *Redding* court embraced is precisely the approach that points *against* holding that such a law is clearly established.⁸⁰ Because the Supreme Court has held that "if officers of reasonable competence could disagree on this issue, immunity should be recognized,"⁸¹ it defies common sense to refuse to recognize immunity where five judges have disagreed. Instead of evaluating this factor, the *Redding* majority, without explanation, dismissed it as irrelevant. Had the court fully engaged in this inquiry, it would likely have recognized that reasonable principals, including Assistant Principal Wilson, could have disagreed about the search's reasonableness. By not giving weight to this factor, the Ninth Circuit decision will likely inhibit school officials from using discretion to maintain order in schools, and thus undermine the purposes of qualified immunity.

board's decision not to renew teacher's contract based on teaching methods); *Johnson*, 388 F.3d at 676 (discussing constitutionality of arresting citizen for recording police arrest on public highway).

⁷⁷ See *Groh*, 540 U.S. at 571 (finding clearly established law over district court and three-judge dissent); *Johnson*, 388 F.3d at 687 (finding clearly established law over single dissenting judge).

⁷⁸ See *Evans-Marshall*, 428 F.3d at 238 (Zatkoff, J., concurring in part and dissenting in part) ("I concur in Judge Cole's majority opinion [finding a constitutional violation] I disagree with the majority insofar as it would deny qualified immunity to the individual defendants.").

⁷⁹ See *Merritt v. Mackey*, 932 F.2d 1317, 1322 (9th Cir. 1991) ("To hold that they *could not* have been correct simply because a dissent was filed would be to hold the majority hostage to the dissent. One judge would have a veto . . ."). The *Merritt* court, however, emphasized the threat of giving *one* judge so much power, and therefore accepted that "dissent alone does not compel" a finding of qualified immunity. *Id.* The court did not say dissent was irrelevant, and in fact carefully considered the dissenting opinion before finding the law clearly established. *Id.* at 1321-22.

⁸⁰ The court cited "common sense" eight times in its majority opinion. See, e.g., *Redding*, 531 F.3d at 1080 ("[The] officials who strip searched Savana acted contrary to all reason and common sense . . ."); *id.* at 1085 ("Common sense informs us that directing a thirteen-year-old girl to remove her clothes . . . was excessively intrusive."); *id.* at 1088 ("Common sense and reason supplement the federal reporters."). The *T.L.O.* Court, however, was not enunciating "common sense" as the standard by which to judge school searches. Rather, it was merely speculating that lowering the "probable cause" standard would free educators from the constraints of legal rules, thus allowing them to act according to common sense. See *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985).

⁸¹ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).